

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL
77-7091

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

FORD MOTOR COMPANY,

Plaintiff-Appellant,

against

M.V. "AUSTRAL EXTENTE", her engines,
boilers, etc.,

and against

FARRELL LINES, INC.; UNIVERSAL TERMINAL
and STEVEDORING CORPORATION and FRANK J.
HOLLERAN, INC., *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANT-APPELLEE UNIVERSAL
TERMINAL AND STEVEDORING CORP.**

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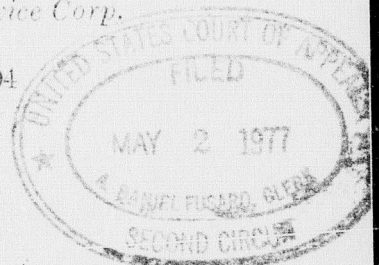


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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF DEFENDANT-APPELLEE UNIVERSAL TERMINAL AND STEVEDORING CORP.

Issue Presented

Pursuant to Clause 4 of the Bill of Lading, were the defendants Universal and Holleran entitled to the benefit of the \$500 per package limitation accorded an ocean carrier by the Carriage of Goods by Sea Act (COGSA) 46 U.S.C. 1304 (5) and Clause 25 of the said Bill of Lading.

Statement of the Case

Plaintiff having consented to the defendant Farrell Lines Inc.'s motion to limit its liability to \$500 per package, this is an appeal by the plaintiff Ford Motor Company from so much of an interlocutory Order and Judgment in an admiralty action in the Southern District of New York (Wyatt, J.), which limits plaintiff's recovery against defendants Universal Terminal and Stevedoring Corporation and Frank J. Holleran, Inc. to five hundred dollars for the contents of each case of cargo (p. 5a).^{*} Following certification by Judge Wyatt, pursuant to Title 28 U.S.C. Sec. 1292(b), (p. 6a), this Court granted leave to appeal (p. 32a).

Facts

On or about March 31, 1975, seven cases of machine parts belonging to the plaintiff were delivered to defendant Farrell Lines, Inc. (hereafter Farrell) at Port Newark for ocean carriage on the M.V. "AUSTRAL ENTENTE" to Melbourne, Australia, there to be delivered by Farrell to the consignee (pp. 12a, 16a). A clean, short form bill of lading was issued by Farrell (p. 12a; Exhibit "A", p. 8a). Incorporated therein by reference was Farrell's long form bill of lading (p. 12a; Exh. "B", p. 10a). Defendant Universal Terminal and Stevedoring Corporation (hereafter Universal) stowed all the cargo loaded on the vessel (p. 16a). Defendant Frank J. Holleran, Inc. (hereafter Holleran) lashed all the cargo loaded on the vessel pp. 16a, 17a). Plaintiff's cargo, along with cargo owned by other shippers, was stowed in "Bay 19" of the vessel (pp. 7a; 14a; 17a).

After the vessel left port and off the east coast of the United States, some of the cargo broke stow causing dam-

^{*} References are to pages in the Joint Appendix.

age to cargo in Bay 19. It is not conceded that the cargo which broke was not in fact cargo owned by plaintiff. Such determination may have to be made if a trial of action is necessary. For the purposes of the motions in the Court below and for this appeal it is assumed, however, that such was the fact.

POINT I

The bill of lading extends to the stevedore the benefit of the limitations and exonerations contained therein and the stevedore's liability, if any, is limited to five hundred dollars per package.

Clause 2 of the Bill of Lading is a Clause Paramount which incorporates the Carriage of Goods by Sea Act.

Clause 25 of the Bill of Lading is an independent package limitation clause limiting liability to \$500 per package unless a higher value is declared (Schedule A on page 10 of this brief).

Clause 4 of the Bill of Lading is the "Himalaya" clause set forth in three sections and confers on defendant Universal and Holleran the right to limit liability to \$500 per package (Schedule B on page 11 of this brief).

Clause 4(a) identifies the parties who are to perform services undertaken by the carrier. It states a relationship between the carrier and the parties enumerated and that the carrier has undertaken to perform services under "this contract" (Bill of Lading).

Clause 4(a) does not limit in any way the time period when the carrier or the enumerated parties are entitled to the exemptions and immunities and the limitations of liability contained in the Bill of lading. Nowhere in Clause 4 is the protection limited only during or while the services are performed on the specific cargo.

Clause 4(b) reads as follows:

“(b) Without limitation or restriction of the exemptions and immunities from and limitations of liability provided for in subdivision (a), the persons and companies mentioned therein shall be entitled to the same, but no further, benefits which the carrier has under Clause 25 and 26 of this bill of lading.”

Judge Wyatt in the Court below correctly found that under Clause 4(b) the stevedores and contractors such as Holleran were entitled to the *same* (emphasis ours) limitations of liability as the carrier.

Clause 4(b) confers upon the parties enumerated in subdivision (a) the exemptions and immunities from and limitations of liability which the carrier has under Clause 25 of the Bill of Lading.

Clause 25 of the Bill of Lading limits the liability of the carrier to \$500 per package. The benefit of Clause 25 is without limitation or restriction and gives to the stevedores and contractors as enumerated in subdivision (a) the same benefits as the carrier.

There is no reference to performing services under this contract in Clause 4(b). The appellant has conceded that the carrier has the benefit of the package limitation under the Bill of Lading. Since the stevedores and contractors are entitled to the *same* (emphasis ours) immunities from and limitations of liability as the carrier, it necessarily follows that the stevedores and other contractors likewise are entitled to the same limitation.

Clause 4(c) likewise does not contain any reference to work to be performed in this contract. Subsection (c) confers upon the stevedores and contractors such as Holleran enumerated in subdivisions (a) and (b) the *same* (emphasis ours) benefits which the carrier has under the Carriage of Goods by Sea Act including but not limited to

Section 4 (5) which is the package limitation clause in the United States Carriage of Goods by Sea Act. Since the appellant has already conceded that the carrier is entitled to the package limitation, the stevedores and contractors are likewise entitled to the limitation. It is to be noted that neither in Clause 4(a) or 4(b) is there any reference or intimation of work to be performed under this contract.

It appears fallacious for the appellant to argue that the carrier does have the benefit of the Bill of Lading limitations, but that Universal and Holleran, who under the Bill of Lading without limitation or restriction have the *same* (emphasis ours) limitations from liability as the carrier, do not have such benefits.

Appellant fails to comprehend the significance of Clause 4(b) wherein the benefit of the package limitation is conferred on Universal and Holleran *without limitation or restriction*. (emphasis ours)

A superficial reading of the *Cabot* case and Farrell Lines "Himalaya" clauses readily reveals the glaring differences between the two clauses which difference was evident to Judge Wyatt.

Appellant argues that in construing Clause 4 the benefits of the limitations are available only and during the time that actual work is being performed on the cargo shipped under a particular Bill of Lading. Although Clauses limiting liability are strictly construed, the law does not push such strict construction to the point of absurdity. *Ataka and Co. v. Howlett No. 18*, 1974 AMC 466, 448 (N.O.R.).

In *Bernard Screen Printing Corporation v. Meyer Line*, 328 F. Supp. 288 affirmed by this Court 464F (2d) 934, (2Cir.) it was held that where a class of persons such as independent contractors is referred to in a contract, it is clear that the class includes all those reasonably falling within the definition of the class. Surely the terms "con-

tractors" and "stevedores" in the Farrell Lines Bill of Lading includes both Universal and Holleran.

The Supreme in *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 held that a bill of lading may extend to a third party a contractual benefit by extending their intent to do so.

The Court in *Bernard Screen Printing Corporation v. Meyer Line*, 464F (2d) 943 (2Cir.), and *Carle & Montanari, Inc. v. American Export Isbrandtsen Lines*, 275F. Supp. 76, affirmed 386F (2d) 839, (2Cir.) held that "Himalaya" clauses similar to the Farrell Lines Bill of Lading are valid and extend the Bill of Lading provisions to third parties.

Judge Wyatt properly found that Clause 4 of the Farrell Lines' Bill of Lading is decidedly different than the Bill of Lading which the District Court had under consideration in *Cabot Corp. v. S.S. Mormacscan*, 298F Supp. 1171 which on appeal this Court affirmed on other grounds in 441F (2d) 476 (2Cir.).

The District Court in the *Cabot* case had under consideration a clause which attempted to define the word carrier as to include "all persons rendering services in connection with the performance of this contract." There was no further wording in the clause which set forth the relationship of the parties or what benefits were to be bestowed by this clause. On appeal this Court affirmed on the grounds that the words "all persons rendering services . . ." were not specific enough to include stevedores to other contractors.

It is submitted that the "Himalaya" clause in the Farrell Lines Bill of Lading properly and effectively confers upon Universal and Holleran all the exemptions and immunities from and limitations of liability including the package limitation without limitation or restriction as to time or place.

POINT II

The Himalaya clause extends the package limitation to work performed by the contractor without limitation.

Appellant in the Court below argued that the limitations from liability were not applicable unless damage occurred while work was being performed on the plaintiff's cargo. It has not been shown nor is it conceded that the particular machine which broke stow was not owned by the plaintiff. Assuming, *arguendo*, that such was the fact it would have no effect on the Court's finding.

Judge Wyatt determined that not only is the Farrell Lines Bill of Lading decidedly different from the one in the *Cabot* case but that in any event he disagreed with Judge Edelstein's reasoning in the *Cabot* case.

The District Court in the *Cabot* case fragmentized the work of the contractor into the great number of separate entities who had entrusted cargo to the carrier. This reasoning fails to recognize the traditional role of the contractor and the economic realities underlying the loading of a vessel.

Since "from the earliest days common carriers have had a duty to carry all goods offered for transportation," common carriage anticipates that a vessel will carry cargo of many shippers. *N.J. Steam Nav. Co. v. Merchants Bank*, 47 U.S. 344. Admiralty jurisprudence has its ultimate source in the ancient law of the sea and shippers of cargo traditionally stand as co-adventurers who will profit from the successful completion of the voyage. The common venture theory is exemplified in the division of losses between a ship and cargo where a peril to the voyage has been avoided by the sacrifice of part of the venture such as the General Average Act.

A contractor in loading, stowing and securing cargo for an ocean voyage does not perform work on an individual piece isolated and independent of all other cargo. The work is and must be performed in relation to all other cargo loaded for the particular voyage.

Performing work for or on a particular piece of cargo does not cease with the actual manipulation of the piece, but continues so that when other cargo is loaded and handled it will not cause damage to any other cargo. If a contractor's obligation with reference to a particular cargo ceases once it is placed in its final resting place, there would then be no recourse by cargo when damage is done by any other instrumentality.

The work performed with reference to one piece of cargo is also to load all others and perform all work so as not to damage any other cargo. Any other conclusion would do violence to the traditional role of contractors in the handling of cargo and to the reasoning process.

POINT III

Carriage of Goods by Sea Act extends to and covers any liability to which the contractors are subject.

The subject bill of lading includes the following clause:

CLAUSE PARAMOUNT

"2. This bill of lading shall have effect subject to provisions of the Carriage of Goods by Sea Act of the United States . . ." (10a)

In addition to this contractual agreement, since this shipment originated in a United States port, to wit, New York, the United States Carriage of Goods by Sea Act (COGSA) applies *ex proprio vigore*. Title 46 U.S.C. § 1300.

Since the bill of lading is to have effect subject to the provisions of COGSA, that Act must be looked to in order to define the terms used in that bill of lading.

The term "Contract of Carriage" relates to the "carriage of goods by sea". U.S.C. 1301 (b). The term "carriage of goods" is defined to cover the "period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. 1301 (e).

Since carriage of goods covers the period from loading on the vessel until discharge, the contract of carriage is being performed by the carrier all during that period. The fact that the plaintiff's cargo was not being manipulated or physically moving in transit does not mean that the contract of carriage was not being performed with regard to it by carrier. Since the carrier, during this period of time, has the limitations from liability contained in COGSA and clause 4 of the Farrell Lines bill of lading extends to Universal and Holleran the *same* (emphasis ours) benefit as the carrier, ipso facto Universal and Holleran have the same protection as the carrier.

CONCLUSION

The order and judgment of Judge Wyatt (p. 5a) should be affirmed.

Respectfully submitted,

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ADDENDA**SCHEDULE "A"****Clause 25 of the bill of lading**

25. Valuation—In the event of any loss of or damage to or in connection with goods exceeding in actual value \$500 per package lawful money of the U.S. or in case of goods not shipped in packages or by customary freight units, the value of the goods shall be deemed to be \$500 per package or the customary freight unit as the case may be, and the carrier's liability, if any, shall be determined on the basis of a value of \$500 per package or customary freight unit unless the nature of the goods have a higher value, which shall be declared by the shipper in writing before shipment and inserted in this bill of lading.

SCHEDULE "B"**Clause 4 of the Ford bill of lading**

4. Beneficiaries of Exemptions, etc.—(a) Because of the relationship between them and as the carrier requires persons and companies to perform or assist it in performance of work or services undertaken by it in this contract, it is expressly agreed between the parties hereto that the master, officers, crew members, contractors, stevedores, longshoremen, agents, representatives, employees or others used, engaged or employed by the carrier in the performance of such work or services, shall each be the beneficiaries of and shall be entitled to the same, but no further, exemptions and immunities from and limitations of liability which the carrier has under this bill of lading, whether printed, written, stamped thereon or incorporated by reference.

(b) Without limitation or restriction of the exemptions and immunities from and limitations of liability provided for in subdivision (a), the persons and companies mentioned therein shall be entitled to the same, but no further, benefits which the carrier has under Clauses 25 and 26 of this bill of lading.

(c) Without limitation or restriction of the exemptions and immunities from and limitations of liability provided for in subdivisions (a) and (b), the persons and companies mentioned therein shall be entitled to the same, but no further, benefits which the carrier has under the U.S. Carriage of Goods by Sea Act, including but not limited to Sections 3(6), 4(1), 4(2)(a), 4(2)(b), 4(2)(q) and 4(5) of said act.

(61404)

Due and timely service of Two copies
of the within **BRAT** is hereby
admitted this **2nd** day of **MAY** 1977

Attorneys for

COPY RECEIVED

MAY 2 - 1977

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